No. 733

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.
ROBIN HOOD OF GRAND RAPIDS, INC.
ROBIN HOOD OF MUSKEGON, INC.
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a
ROBIN HOOD MUFFLER SHOP
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a
MIDAS MUFFLER SHOP OF BATTLE CREEK
CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

PETITIONERS

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO. INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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RESPONDENTS' PARI DELICTO ARGUMENTS ARE BASED UPON A DISTORTED AND OFTEN ERRONEOUS REPRESENTATION OF THE RECORD AS WELL AS AN ERRONEOUS ANALYSIS OF THIS COURT'S DECISIONS

[This Section discusses material in respondents' brief, pp. 29-57]

Respondents have tried to force the facts to fit their erroneous legal theory that this Court has "recognized" [Respondents' Brief, hereinafter recited as "RB" 35] the *in pari delicto* doctrine "to bar recovery in actions brought to recover treble damages under the antitrust laws" [RB 32] where the treble-damage claimants were co-participants in an illegal endeavor. By editing the record with quotations out of context, partial quotations which are wholly misleading and statements unsupported or actually refuted by the record, respondents have attempted to create the impression that petitioners, together with respondents, were responsible for formulating and initiating the MIDAS franchise program and the MIDAS franchise agreement[1]. The record will not support this construction. Respondents and respondents alone, without any assistance at all from petitioners, originated, formulated, promulgated, initiated and developed the MIDAS

[1] At various points in their brief respondents had charged that petitioners "helped to formulate the new Midas plan for merchandising automotive exhaust systems" [RB 2, Questions Presented]; "pioneered with MIDAS in evolving its concepts" [RB 8]; "discussed and voted upon policies concerning the alleged illegal restrictions with respect to resale price maintenance, wholesale sales, and the sale of shocks and springs or other similar items" [RB 11]; "participated in the formation and development of franchise policies" [RB 26]; "voluntarily joined with [respondents] in the initiation of this franchise program" [RB 29]; "helped formulate the program" [RB 48]; "participat[ed] in and vot[ed] upon the formulation of franchise policies" [RB 50]; "fostered, and helped to formulate [the] very restraints" [RB 53]; aided "in the formation of . . . the scheme" [RB 57]; and accused petitioners of being "joint venturer[s]" with respondents "in an alleged illegal arrangement" [RB 57].

program, the MIDAS franchise system, and the MIDAS franchise agreement.

A. Respondents Have Misstated the Record in Alleging that Petitioners Were Co-initiators and Co-formulators of the Midas Franchise Program and Agreement.

Respondents' unfounded, but often repeated assertions that petitioners were co-initiators or co-formulators of the MIDAS program, the MIDAS franchise system and the MIDAS franchise agreement have no basis in the record. Indeed, the record which the respondents previously made in the District Court conflicts directly and totally with the assertions which the respondents now make.

The plain facts are that the respondent International Parts, Inc., and Nathan and Gordon Sherman who were its controlling stockholders, initiated the concept of MIDAS, its form of franchise agreement, and its method of operation before petitioners became MIDAS franchisees and that the petitioners played no part in this formulation. For example, according to an affidavit [Appendix, hereinafter "A" 64-72] which the respondents filed in the District Court, Gordon and Nathan Sherman "organized MIDAS, Inc." as a wholly owned subsidiary of International Parts Corporation in 1955 [A 67]. International Parts, which the Shermans controlled, was in the business of distributing automotive replacement parts "primarily exhaust system parts, i.e. mufflers, tailpipes, exhaust pipes" [A 65]. It was organized in 1938. International Parts, according to the affidavit, "decided" that through MIDAS it would franchise outlets to which it would sell exhaust system parts rather than extend its business operations into the retail area by direct ownership and management [A 67]. To achieve this purpose International Parts "decided upon an overall promotional concept" which included brand identification, a unique coast to coast lifetime guarantee, free installation, 15-minute service and a large national advertising program [A 68-69]. To "insure" that

participating franchisees "performed in accordance with the MIDAS image" each franchisee "signed" a License and Sales Agreement [A 70]. The sworn deposition testimony of Gordon Sherman shows that respondents, and respondents alone were responsible for the franchise agreement and the ideas contained in it [Sherman Dep. 27-29]:

"Q. Did you discuss with anyone the drafting and formation of the agreement, which is that which appears in Appendix A of the Answer in this cause [Respondents' first franchise Agreement]?
A. I believe that I did.

Q. With whom do you believe you discussed that?
A. Mr. Silbert [Respondents' attorney].

Q. And with your father?
A. I don't remember.

Q. Was the agreement an idea of yours?
A. I don't understand the question.

Q. I mean was the preparation and the idea of entering such franchise agreement an idea which you had?
A. I am still not quite sure what you mean.

* * *

Q. Was the idea of setting up MIDAS, Inc. in franchise agreement form, executing franchise agreements with various dealers at the retail level thoughout the country your idea?
A. Mostly.

Q. And it was discussed with Mr. Silbert in the formation and drafting of the agreement, is that correct?
A. Yes.

Q. Was the idea in broad terms discussed by you also with your father?
A. Yes.

Q. Was it discussed by you with anyone else?
A. Perhaps.

Q. I mean in the company, in International Parts Corporation.

A. Perhaps.

Q. Do you recall with whom?

A. No, I don't.

Q. You have no recollection then of any specific persons with whom you discussed it except Mr. Silbert and your father?

A. That's right."

To avoid the plain meaning of these facts respondents emphasize the activities of the National Advisory Council which they created in March of 1957 [RB 9-11, 50, 64] some sixteen months after respondents promulgated and entered into their first franchise agreements [December, 1955] which then contained the exclusive dealing, tying and price-fixing provisions which are the subject of petitioners' complaint. The Council was composed of ten of respondents' franchisees. Each of the petitioners served on the Council at one time or another between 1957-1960. The Council did not hold its first meeting until October 1957 [RB 9] more than sixteen months after any of the petitioners entered into his first franchise agreement. Respondents allege that petitioners, as members of the National Advisory Council, "voted upon policies concerning the alleged illegal restrictions [of which they complain]" namely, resale price maintenance, wholesale sales and the sale of shocks and springs and other similar items [RB 11]. According to the Respondents, "policy decisions" involving the "Midas concept" were the joint product of petitioners and respondents and not the respondents alone [RB 10].

Respondents' assertions ignore the record. They quote parts of petitioner Ross's depositon at pages 284 through 287 to describe the "function of the National Advisory Council and reach the conclusion that policy decisions were made by petitioners and respondents "working together" and "not made" by the respondents "alone" [RB 10]. Respondents, however, conveniently omit and completely ignore Ross's testimony at the intervening pages 285-286:

> "Q. Is it a fact, Mr. Ross, that the function of the council was to decide what you have previously described as Midas policy?
>
> A. The National Advisory Council never formed policy, never. This was a prerogative always exercised by the powers that be within the Midas organization."[2]

Respondents' assertions that the National Advisory Council "voted upon" policies concerning illegal restrictions [RB 11] are not even supported by the record references which they cite. Ross's deposition [pages 296 and 297] shows nothing more than a "pro and con" discussion of resale price maintenance. His testimony with regard to wholesaling [290] which is also cited by the respondents is to the same effect. Ross's testimony with regard to respondents' restrictions on the sale of shock absorbers [294-295] is typical and also to the same effect. The National Advisory Council did not "vote upon" a ban on the sale of shock absorbers [294-295]:

> "Q. The contract, the License and Sales Agreement, for example did you ever bring up at a general meeting the problem of selling only Midas?
>
> * * *
>
> A. Now, that is rather ambiguous. I think what you are trying to ask me – let's see if I am right. When you say 'only Midas' are you referring to the Midas mufflers, tail pipes, and exhaust pipes, or are you talking about related items?
>
> Q. Including merchandise other than MIDAS.
>
> A. Yes, this was brought up in the general area of around 1957, late 1957, early 1958 and prior to that time.
>
> I had testified previously that I had talked with Nate and Gordon Sherman –

[2] Ross testified that the National Advisory Council's powers were limited to making *suggestions* to respondents and that the Council had, from time to time, made some suggestions. None of these involved unlawful restraints.

Q. These are private conversations?

A. Yes I am leading up to that.

Other dealers became aware of the fact that somewhere in the program there was knowledge of other Midas installation shops selling shocks and brakes and this got to be of quite some concern to a number of us, I particularly, because this is something I wanted long ago.

Yet I heard through the group within, not specifically, that there were certain operators installing shocks. I wanted it. I was for it, and there were other dealers either at the regional meeting that we had in St. Louis or in Ashville who discussed it.

We were told this thing was being thought about at headquarters, but as of right now, the answer was 'no'." [Ross Dep. 294-295][3]

Ross's testimony about the activities of the National Advisory Council is corroborated by the testimony of the petitioner Pierce. [Pierce Dep. 171-173] See *infra*, section II D at 35.

Respondents' assertions that petitioners were somehow responsible for the unlawful provisions in the franchise agreement is pure legerdemain. These provisions, as the record well shows, were originated by the respondents with-

---

[3]Respondents' reference to a vote by the National Advisory Council to discontinue "wholesaling" is equally misleading. Respondents suggest that Ross testified to this fact [RB 11]. In their brief they imply that they are quoting Ross. Ross did not testify to this assertion at all. The language which respondents quoted in the Brief is part of a question asked by counsel for respondents of Ross; it is not Ross's testimony:

> "Q. Isn't it a fact that it **was the consensus of the National Advisory Council at that meeting that wholesaling should be discontinued?**
>
> "A. Possibly, but that doesn't necessarily mean that I would have to agree." [Ross Dep. 290]

The quotation which the respondents attribute to Ross is in bold face type in the colloquy above. It is Hornbook law that the questions of counsel, particularly adverse counsel, cannot be evidence.

out any help at all from any of the petitioners. The provisions were promulgated by respondents in a preprinted franchise agreement form in 1955 and then offered to each of the petitioners. The provisions preceded the petitioners in the program and not the other way around as respondents imply. Except for description of the location, all of the franchises were absolutely identical. Petitioners had nothing to do with formulating the terms of the franchise agreement, its exclusive dealing, tying, and price-fixing provisions, or its restraints on alienation. Petitioners were not co-initiators, co-formulators, or co-promulgators of the MIDAS franchise, the MIDAS system or the MIDAS franchise agreement. They merely accepted the franchise agreement in order to obtain the right to purchase and sell respondents' MIDAS muffler which offered brand identification, and national advertising which featured 15-minute service, free installation, and a "unique" [RB 8, 48] coast to coast lifetime guarantee.

B. The Unlawful Restraints in the Franchise Agreements Are Not Reasonably Ancillary to the Midas Franchise Concept.

Respondents have distorted the nature of the petitioners' complaint as well as the record. They construe the complaint as a broad attack upon their entire franchise system[4] and argue that the franchise agreement "must be viewed as a whole and in its entire context" and not in its separate unrelated pieces [RB 47]. This construction and argument are unsound as a matter of fact as well as law.

Petitioners do not now and never have challenged respondents' franchise system *per se*. The system itself is not unlaw-

[4]Respondents for example refer to their "allegedly illegal and restrictive program" [RB 2, counter statement of questions]; their assumption for the purpose of their motion for summary judgment that their "franchise arrangement was illegal" [RB 6]; the franchise "now claimed to be illegal" [RB 16, 24]; the "allegedly illegal system of distribution" [RB 24]; the "allegedly illegal program" [RB 26]; and so on. See also RB 29, 51, 52.

ful *per se*, notwithstanding respondents' "assumptions" [e.g. RB 8] to the contrary. The thrust of petitioners' complaint is addressed to only those provisions of the franchise agreement and program practices which were illegal: namely, the price-fixing and exclusive dealing and tying provisions and practices which restricted the persons to whom and the territories in which franchisees could sell merchandise which they had purchased from respondents. None of these unlawful provisions were essential to the MIDAS system which was based upon (1) muffler brand identity through the trade-mark MIDAS; (2) a "unique" coast to coast lifetime muffler guarantee, (3) 15-minute service, (4) free installation and (5) a large national advertising program. There was nothing inherently unlawful about this system. The vice of the respondents' arrangement was its use of this system to expand its business through a variety of unlawful restraints which included price fixing, exclusive dealing, and tying restraints as well as restraints upon alienation.

The antitrust laws do not authorize exemptions for franchisors or the imposition of exclusive dealing, tying and price fixing arrangements or restraints upon alienation through the use of franchise agreements. *Goodyear Tire and Rubber Co. v. FTC*, 331 F.2d 394, 401 (C.A. 7, 1964), aff'd, 381 U.S. 357, 85 S. Ct. 1498 (1965); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856 (1967). Such restraints are illegal in and of themselves. They need not be coercively induced. *Sun Oil Company v. FTC*, 350 F.2d 624, 636 (C.A. 7, 1965), cert. denied, 382 U.S. 982, 86 S. Ct. 559 (1966). Here petitioners imposed such restrictions as the only basis on which they would do business. Petitioners accepted the restrictions in order to acquire the right to purchase and sell the MIDAS muffler which carried a "unique" coast to coast lifetime guarantee as well as extensive national advertising and not in any effort to assist, help or cooperate with respondents in violating the antitrust laws [A 138-140]. *Bales v. Kansas City Star*, 336 F.2d 439 (C.A. 8, 1964). They adhered to the restraints to retain the right

to purchase and sell the MIDAS muffler. The franchise was cancellable on thirty days notice [A 44]. Moreover respondents enforced the restraints through the use of subtle and sophisticated techniques ranging from covert threats of franchise termination to full blown termination where threats proved ineffective [e.g. A 175-201]. See *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960), cert. denied, 366 U.S. 963, 81 S. Ct. 1924 (1961), Second Opinion 324 F.2d 566 (C.A. 4, 1963). See *infra,* Section II, at page 22.

Respondents' attempts to justify the unlawful restrictions in their franchise agreements as reasonably ancillary to legitimate business objectives are unavailing. Petitioners did not seek the restraints of which they complain. Such restraints were a part of the MIDAS program before petitioners accepted their first franchise agreements. Moreover, petitioners did not "foster" or enjoy the "fruits" of an "alleged illegal system" [RB 52]. Respondents' repeated references [RB 13 and 52] to petitioners' profits as MIDAS franchisees only confuses the issue; they ignore the fact that petitioners earned profits as MIDAS franchisees *in spite of and not from or because of* the illegal restrictions. Sales generated as a result of petitioners' own efforts, which included a considerable volume of local advertising[5] coupled with national advertising which featured the MIDAS muffler, a "unique" coast to coast lifetime muffler guarantee, and prompt, efficient, free, 15-minute installation, produced petitioners' profits. The unlawful restrictions severely reduced the extent of these profits [A 151, 155]. Respondents' overall argument that petitioners did not and could not have suffered injury because they profited from the "program" is completely false. Cf. *Utah Pie v. Continental Packing Co.,* 386 U.S. 685; 87 S.Ct. 1326 (1967).

Petitioners were "injured" in their businesses as a direct result of the unlawful restraints which the respondents

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[5]Ross alone in vested over $129,000 in local advertising while a MIDAS franchisee [R 907]; Petitioner Pierce invested $150,000 in local advertising during the same period [A 130]. Collectively the cost of petitioners' local advertising exceeded $400,000.

imposed. The price-fixing restraings were illegal *per se*. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S. Ct. 503 (1960). In spite of this or perhaps because of this respondents contend that petitioners benefited from resale price maintenance since "they were free to maintain higher prices" [RB 49]. As a further justification respondents assert that resale price maintenance was necessary to "avoid any conflict with the national image" which MIDAS sought to create [RB 48]. Both of these contentions are without merit and ignore the record.

Petitioner Ross testified that he was unable to compete with a competitor who sold another of respondents' mufflers, the International brand, because of respondents' resale price policies. The competitor, he said, advertised the International Brand muffler as the "same" as the MIDAS muffler with the "same guarantee" and sold it at prices which were below prices which respondents fixed for their MIDAS muffler [A 55, 137; Ross Dep. 211, 101]. Petitioner Skarupa testified similarly [Skarupa Dep. 294]. Respondents can point to nothing in the record which refutes these facts. Moreover there is nothing in the record to support respondents' unfounded assertion that petitioners benefited because they were "free to maintain higher prices."

Respondents' contention that resale price maintenance was necessary to "avoid any conflict with the national image" is subject to even more serious legal defects. This argument assumes erroneously that all of the parts which respondents "sold" their franchisees bore the MIDAS trademark together with the equally erroneous assumption that all MIDAS franchisees operated in fair trade states. Both assumptions are wrong.

The record shows that tailpipes, exhaust pipes, hollywood mufflers, and indeed all exhaust system parts other than the MIDAS muffler which MIDAS sold its franchisees bore no trademark, MIDAS or otherwise [A 220-222 and references

cited therein[6]. Respondents' trademark registrations [A 106 and 107] do not aid them. Through these registrations "covered" [RB 58] tailpipes, exhaust pipes, and clamps, they did not cover the tailpipes, exhaust pipes and clamps which respondents sold to petitioners. The record shows that respondents did not use these trademarks on tailpipes, exhaust pipes and kindred items which they sold petitioners A 221-222]. Respondents used the mark on the muffler and the muffler alone.

One of the petitioners herein, Claude Wheeler, operated MIDAS muffler shops in the free trade State of Missouri. This state had no fair trade law exempting vendors from the provisions of Section 1 of the Sherman Act. Additionally a review of respondents' response to petitioners' subpoena duces tecum dated November 22, 1960 shows that a number of the respondents' franchisees were doing business in states which had no so-called fair trade laws.

Respondents do not even seriously attempt to justify the exclusive dealing and tying provisions in their franchise. They could not do so even if they tried. The provision had no redeeming virtue. Petitioners were required to pay more for exhaust system parts (other than MIDAS mufflers which were trademarked and available only from respondents) which they purchased from respondents than they would have paid had they been free to purchase the same parts from respondents' competitors [A 185-189]. It is difficult to imagine how petitioners could have profited, benefited or

---

[6]Gordon Sherman admitted in his deposition that respondents did not place a trademark on exhaust pipes, tailpipes and muffler clamps [A 163]. This was corroborated by respondents' witness Schroeder [A 166]:

> "Q. Was the name Midas placed upon any of these items by putting the item in a box with a Midas name on it or by attaching a tag with a piece of wire or string during any of the period 1955 through and including 1960?
>
> "A. Not to my knowledge."

To the same effect see the testimony of petitioners Ross and Skarupa [A 221 and 222]; see *infra*, section IIC(2) at page 31.

even enjoyed the "fruits" of this restraint. Moreover, the record shows that the petitioners consistently objected to this restraint [A 54, 56-57, 61] and that respondents just as consistently enforced the restraint, advising its field counsellors that it was "essential to participation in the Midas program" that franchisees not buy from Texas Tailpipe Company [A 189]; that to purchase from outside sources was a "felony," indeed a "capital offense," that field counsellors could not "work with a dealer if this kind of thing prevailed" [A 192]; and that it was time to "enforce" respondents' exclusive dealing policies [A 182].

Respondents' prohibition of the practice of "wholesaling" [A 178, 181] constituted an unlawful restraint on alienation as well as an unlawful resale price maintenance restraint. Petitioners were denied an entire market and suffered consequent injury in losses of profits from sales as a result of this restriction.

The antitrust laws do not authorize restraints of the foregoing character. These restraints are not exempt from the provisions of the antitrust laws, merely because they are incident to some other purpose, such as a franchise program, which is itself lawful.

C. Simpson v. Union Oil of California Controls the Case at Bar.

Respondents' analysis of this Court's decisions are misleading and inaccurate. Those decisions do not give substance to the theory which the respondents seek to sustain.

Respondents' assertion that "this court" has "recognized" [RB 35] and "consistently applied" the "*in pari delicto* doctrine" in private treble damage actions [RB 29] is not correct. To the best knowledge of the petitioners this Court has never upheld the defense of *in pari delicto* in any private antitrust case which it has decided. 78 Harv. L. Rev. 1241, 1244 (1965), "In Pari Delicto and Consent as Defenses in Private Antitrust Suits."

To support this naked assertion respondents cite one case decided by this Court, *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377, 47 S. Ct. 400, 405 (1927). Respondents assert that in this case the Court "approved" [RB 3, 5] a District Court instruction that if the plaintiff was *in pari delicto*, the plaintiff "could not recover any damages whatsoever on account of defendant's refusal to continue to sell it goods" [RB 35]. A careful reading of this Court's opinion shows that this Court did not "approve" this instruction.

The language from this Court's opinion which respondents quote [RB 35] represents nothing more than this Court's resume of a jury instruction given by the District Court. In other words, the language quoted by respondents in their brief from *Eastman Kodak Co.*, supra, is in fact part of this Court's statement of the facts in that case. The quoted language does not represent this Court's "approval" of the instruction or an application by this Court of the "*in pari delicto*" doctrine.

Southern Photo had won an award of treble damages under Section 7 of the Sherman Act. The Court of Appeals affirmed. Eastman asked this Court to review the decision. It challenged the competency of the proof offered by Southern, as a measure of Southern's damage. John W. Davis, Eastman's attorney, argued that Southern could not use the profits it earned as Eastman's customer to measure its losses for the period after Eastman refused to continue dealing with Southern, alleging among other things that Southern had during the prior period participated with Eastman in an unlawful monopoly. Nonetheless this Court affirmed the jury's treble-damage verdict, stating that "under the circumstances of this case" there was nothing in the trial court's "instructions [one of which was of an in pari delicto nature] of which [*Eastman* could] justly complain." 273 U.S. at 377-378. This Court did not pass upon the validity of the district court's *in pari delicto* instruction. This Court affirmed the judgment that Southern had won below, in spite of—and not because of—this instruction.

Respondents' efforts to rely upon *Bishop v. American Preservers Co.*, 105 F.2d 845 (N.D. Ill. 1900) [RB 32]; *Northwestern Oil Co. v. Socony Vacuum Oil Co.*, 138 F.2d 967 (C.A. 7, 1943), cert. denied, 321 U.S. 792, 64 S. Ct. 790 (1944) [RB 45] and their attempts to distinguish [RB 43] *Ring v. Spina*, 148 F.2d 647, 653 (C.A. 2, 1945); *Enterprise Industries Inc. v. Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955), rev'd on other grounds, 240 F.2d 457 (C.A. 2, 1956), cert denied, 353 U.S. 965, 77 S. Ct. 1049 (1957); *Red Rock Bottlers, Inc. v. Red Rock Cola Co.*, 1952 Trade Cases CCH ¶ 67,375 (N.D. Ga. 1952) [RB 47]; and *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960), cert. denied, 366 U.S. 963, 81 S. Ct. 1924 (1961); Second Opinion, 324 F.2d 566 (C.A. 4, 1963) are without merit.

Bishop, supra, and *Northwestern Oil Co.*, supra, are not directly in point. In *Bishop* the defense was an alternate ground for denying recovery since the court held that the injury came from an act of the defendant which was not unlawful. The *in pari delicto* statement in *Northwestern Oil Co.* was no more than dictum inasmuch as plaintiff was denied recovery for failure to prove damages.

Respondents cannot distinguish *Ring*, supra, *Enterprise*, supra, and *Red Rock*, supra, on the ground that the treble damage plaintiffs there were "victims" rather than "participants" since they entered into "the illegal arrangement not in the hope or expectation of gaining any benefit therefrom. . . ." [RB 43]. In those cases the treble damage plaintiffs had entered into agreements with the defendant with the *full expectation* of gaining "benefits" in spite of and not from or because of the illegal provisions in their agreement.

Red Rock Cola, supra, is almost precisely parallel to the case at bar. Indeed, the defendant there relied upon some of the same authorities that are relied upon by the respondents here: *Harriman v. Northern Securities Co.*, 197 U.S. 244, 25 S. Ct. 493 (1905) [RB 32] and *Northwestern Oil Co.*,

supra [RB 35]. The District Court reviewed these authorities and rejected the *in pari delicto* defense stating:

> "In the case here, the plaintiff was not in business, could not be coerced, and was organized and created for the purpose of engaging in business by reason of the rights granted under the contracts which contain the provisions now challenged, and did so operate for several years.
>
> "It is contended by the corporate defendants that this was such participation as placed plaintiff *in pari delicto*. However, it is neither contended or shown that the plaintiff derived any benefit from the challenged provisions of the contract or that it sought to have such provisions included therein.
>
> "*Since the provisions of the contract which are challenged benefit the corporate defendants, and restrict plaintiff, it is reasonable to assume that plaintiff submitted to rather than shared in the benefits from such provisions* . . .
>
> * * *
>
> "Here the provisions of the contracts which are challenged are for the benefit of the defendants. Plaintiff derived no benefit from acting under them, the provisions being restrictive in character they were of sole benefit to the corporate defendants.
>
> "Under the facts of this case the plaintiff does not stand *in pari delicto* with the corporate defendants. See *Ring v. Spina*, . . . 148 F.2d 647." [at 67,965, emphasis supplied].

Osborn v. Sinclair Refining Co., supra, cannot be distinguished on the ground that the dealer in that case had never "voluntarily signed or *entered into any agreement*" regarding the illegal restrictions of which he complained and therefore involved neither *in pari delicto* nor consent [RB 47]. This assertion is not true. In his opinion in that case Chief Judge Sobeloff carefully described the "agreement" which was the predicate for the litigation stating:

> "In the present case, it is clear from the findings of fact that Sinclair-Sherwood's conduct went beyond

> a mere announcement of policy and refusal to deal. As pointed out above, the findings compel the conclusion that there existed, in fact, an express agreement with this particular plaintiff to buy Goodyear TBA, made after the cancellation of his first lease in order for the plaintiff to be restored as a gasoline dealer. This case is not within the *Colgate* doctrine. Moreover, it is no distinction to say that *Parke, Davis* was concerned with price-fixing whereas here we have a tie-in. Both price-fixing and tie-ins affecting a not insubstantial amount of commerce, are illegal per se. . . ." [286 F.2d at 839]

The Fourth Circuit had previously held, in *McElhenney v. Western Auto Supply Co.*, 269 F.2d 332 (C.A. 4, 1959), that a franchise dealer could not state a cause of action under Section 3 of the Clayton Act if he was unable to show an agreement. In *McElhenney*, Chief Judge Sobeloff said:

> "The gravamen of a Section 3 violation is the forbidden condition, agreement or understanding of exclusivity, and a proper pleading should assert this ultimate fact. It makes no difference *whether this is voluntary or is imposed by coercion*, but without such agreement, condition or understanding, there can be no statutory infraction. It is only in the presence of this essential element that consideration must be given as to whether competition may be substantially lessened, or whether there is any tendency toward monopoly. . . ." [at 338-339, emphasis supplied]

Chief Judge Sobeloff's statement in *McElhenney*, supra, is extremely significant, particularly so, in light of respondents' misplaced reliance upon *Pennsylvania Water and Power Co. v. Consolidated Gas, Electric Light and Power Co.*, 209 F.2d 131 (C.A. 4, 1953), cert. denied, 347 U.S. 960, 74 S. Ct. 709 (1954) which, unlike the present case, involved litigation between co-conspirators.. Respondents ignore the fact that though the Fourth Circuit, relied upon the *in pari delicto* doctrine in *Pennsylvania Water*, supra, it nevertheless subsequently decided in favor of *Osborn* against Sinclair in a

treble-damage action under Section 4 of the Clayton Act (15 U.S.C. 15) which more nearly parallels the case at bar. Moreover, the dictum in *McElhenney*, supra, suggests that respondents' contention that "coercion" is essential to relieve an antitrust treble-damage plaintiff of the *pari delicto* onus is incorrect. It is additionally significant that Circuit Judge Soper who wrote the opinion in *Pennsylvania Water*, supra, also participated in the Fourth Circuit's decisions in both *Osborn* cases, as well as *McElhenney*, supra.

Respondents' assertions that *Simpson v. Union Oil Co. of California*, 377 U.S. 13, 84 S. Ct. 1051 (1964), reversing 311 F.2d 764 (C.A. 9, 1963) had "nothing to do with the defense of *in pari delicto*" [RB 46] is likewise incorrect. Respondents categorically, but erroneously state that "*in pari delicto*" was "not involved" [RB 44, 45] in *Simpson* and was not "considered" or "pased upon" either by "the lower courts" or by this Court [RB 44]. Respondents compound their error by implying that none of the briefs in *Simpson* argued the *in pari delicto* doctrine [RB 46].

In granting summary judgment to Union in *Simpson*, supra, the District Court "considered" the *in pari delicto* question and said:

> "The assumed illegality of the agreement could have afforded a defense if Union had sought to enforce the consignment contract, *Continental Wallpaper Co. v. Lewis Voight & Sons, Co.*, 212 U.S. 227, but it does not follow that plaintiff would have had any right to assert damages. Both the doctrine of *pari delicto* and *volenti non fit injuria* would afford an adequate defense to such a claim." [1961 Trade Cases, CCH ¶ 69,936 at 77,698 (1961)]

Thus, contrary to respondents' brief, the doctrine of in *pari delicto* was involved in *Simpson*, supra, and was "considered" by a lower court. Moreover, when *Simpson*, supra, reached this Court, both petitioner and respondent argued the *in pari delicto* question [Respondent's Brief in *Simpson v. Union Oil Co. of California*, No. 87, October 1963 Term, at 84-86; Petitioner's Brief, No. 87, October 1963 Term, at 46].

D. Respondents' Attempts To Apply the In Pari Delicto Doctrine Ignore the Record.

Respondents urge the Court to apply the *in pari delicto* doctrine to bar petitioners from proceeding under Section 4 of the Clayton Act because there is no evidence (according to respondents) to suggest that any of the petitioners were "coerced" to "enter into" their franchise agreements with respondents [RB 53]. To afford petitioners relief would, according to respondents, "defeat the very policies of the antitrust laws" which the petitioners purport to be "enforcing" and would "encourage persons to become active participants in illegal schemes knowing that if the schemes should work out disappointingly they would recover three times their alleged losses" [RB 56].

Respondents' theories are erroneous. The presence of "coercion" is not essential to vitiate the defense of *in pari delicto*. *McElhenney v. Western Auto*, supra [dictum]; *Simpson v. Union Oil Co. of California*, supra; see 78 Harv. L. Rev., supra. Furthermore, inherent in the respondents' theory, is the fallacious concept that once a franchisee "voluntarily" *enters into* an agreement which contains unlawful provisions, his franchisor may thereafter "enforce" the unlawful terms in that agreement without regard to the antitrust laws, including Section 4 of the Clayton Act. Section 4 cannot be read to permit this result. Moreover, we believe, contrary to respondents' assertions, that this Court has held that a "seller's unilateral offer of terms of sale, leaving the buyer free to accept or reject, amounts to coercion sufficient to vitiate *pari delicto* whether or not the seller states that the same terms will be offered to others if the buyer rejects" [RB 53]. See *Simpson v. Union Oil Co. of California*, supra, at 16. Compare 78 Harv. L. Rev. at 1246 (1965) "In Pari Delicto and Consent as Defenses in Antitrust Suits"[7].

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[7] "Explicit in the [*Simpson*] opinion is a judgment that the public aspects of the private action, which led the Court in

Coercion[8] in fact clearly existed in the case at bar. Respondents forced petitioner Pierce to accept his first franchise agreement. He did not seek respondents out to obtain their franchise and he did not accept his first franchise willingly or with alacrity [A 124]:

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earlier decisions to narrow the *in pari delicto* defense required this further narrowing. Most of those who had followed Union Oil's price schedules were required to comply with them as a condition of acquiring and keeping their franchise. Barring Simpson's recovery would have foreclosed all private suits, and would have limited potential sanctions against Union Oil to those that might be imposed in a Government sponsored action. The Court in Simpson however seemed to find some support for its holding in the private equities of the case. Mr. Justice Douglas repeatedly termed the agreement coercive. The decision therefore went beyond prior case law since the alternative available to Simpson—refusing to accept the illegal terms and thus failing to obtain the lease—entailed not a loss of investment but only a loss of an economic opportunity. This redefinition of coercion seems to recognize implicitly that the interaction of competitive forces necessary for maintenance of a market economy can only be preserved by preventing firms from abusing market power, and that generally a firm will agree to comply with conditions such as those imposed in Simpson simply because it has no equally advantageous alternative. The firm in the superior market position is able to impose such terms because refusal by one party will not preclude finding another who is willing. Moreover, barring one who has complied with such terms from judicial remedy would not seem likely to deter him, since, even if warned he would fail in a later suit, he will still accept the best economic opportunity. Because the plaintiff has not initiated the conspiracy and is coerced in a very real, albeit economic, sense, the defense of *in pari delicto* should fail unless the defendant can establish that the plaintiff either encouraged the scheme or actively assisted in its operation or formulation. In keeping with economic realities, the rejection of the defense here should be accompanied by a rule of law that to require acceptance of unlawful terms as a condition of dealing is of itself sufficient to establish coercion which cannot be rebutted by a showing that plaintiff could have dealt on legal terms with equal advantage elsewhere." 78 Harv. Law. Rev. at 1246]

[8] See A 139-140: Coercion of Ross. Respondents forced all franchisees, including petitioners, to adhere to the unlawful provisions in the franchise agreement once franchisees accepted the agreement.. See *infra*, sections IIA and IIC at 22 and 29.

"Q. With whom did you first discuss the MIDAS brand?

A. Charles Lichterman.

Q. Remember when that discussion took place?

A. It was prior to April 1, 1956.

Q. Was it in 1956?

A. Yes sir, to the best of my recollection it was.

Q. Do you recall the substance of that discussion?

A. Yes, sir. Mr. Lichterman called on me. We sat in my office and he presented me with this Midas franchise. I told him I wasn't interested in it. Because of my experience with franchises in the past, I told him that I was satisfied to operate as an independent operator."

* * *

Q. What was the nature of that experience?

A. By that, I mean it was my experience that the companies that franchised a dealer pressured the dealer to handle their merchandise exclusively and objected to the purchases of merchandise from other sources of supply.

Q. Was this mainly your experience with appliance lines or –

A. No, sir, general.

Q. Any particular line?

A. Well, for example, Firestone. We primarily took on that franchise to handle their tires. That was a major part of our business and, actually, they tried hard to sell us allied lines that they handled, and inasmuch as we were operating more or less independently, we resisted this pressure and conducted our business as we saw fit. *And for that reason, I did not want to tie myself up with any franchise.* I was satisfied to operate as I had in the past, handling International mufflers and shock absorbers and springs which I purchased from other sources." [Pierce Dep. 40-41, emphasis supplied].

Thereafter when respondents suggested that (1) they would refuse to continue to sell him their International brand muffler which he already carried in his independent muffler

installation shops and his other retail outlets, and (2) advised him that he might face stiff competition from some future MIDAS franchisee if he refused the franchise, Pierce accepted the MIDAS franchise. [A 124-125]

Application of the *in pari delicto* doctrine here conflicts with the central policies of the antitrust laws, particularly Section 4 of the Clayton Act. If the doctrine is applied, franchisors can make a mockery of the antitrust laws without fear of liability to their franchisees by the absurdly simple technique of reducing unlawful antitrust restrictions to the very agreements which the antitrust laws specifically condemn. This will surely encourage antitrust violators. Franchisors will have little to fear from their schemes in violation of the antitrust laws if their only exposure to franchisees is the threat of the prospective provisions of an injunction under Section 16 of the Clayton Act (15 U.S.C. 25). Fear of a treble damage action, however, will discourage franchisors and others from initiating illegal arrangements. The threat of a treble damage action is a far more potent deterrent to antitrust violations than is the threat of an injunction,[9] or the threat of enforcement by either the Department of Justice or the Federal Trade Commission. The penalty of treble-damages is far more efficacious since treble damage verdicts easily can exceed the criminal or civil penalties which a court is likely to impose in an action brought by the Government. See 113 Pa. L. Rev. 1071, 1080 (1965) "Unclean Hands, the Effect of Antitrust Violations on Antitrust Actions".

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[9] Respondents suggest that if the relief sought by petitioners were merely injunctive in nature that there would be more merit to the claim. [RB 44] This appears to be an illogical contention. Since the doctrine of *in pari delicto* is equitable in nature it would be more logical to conclude that it would have greater efficacy in an injunction action, an action in equity, than it would have in a damage action, an action at law. If *in pari delicto* applies to an action at law, it surely ought to apply in an action in equity. To argue that it applies in an action at law but not in an action in equity seems anomalous.

II

RESPONDENTS CANNOT JUSTIFY THE UNLAWFUL RESTRAINTS IN THEIR MIDAS FRANCHISE AGREEMENTS BY ARGUING THE MERITS OF THEIR PLAN

[This Section discusses material in Respondents' Brief, pp. 58-68]

A. Respondents Forced Petitioners To Adhere to the Unlawful Restrictions in Their Franchise Agreements.

Respondents attempt to create the impression that while their franchise agreement form may have contained provisions which are proscribed by the Sherman and Clayton Acts respondents did not compel their franchisees, including these petitioners, to adhere to those provisions. To bolster this notion respondents rely upon two "judiciously" selected passages from the deposition testimony of one of the petitioners herein, Joe Pierce [RB 60]. These incomplete references do not prove the point. To fully understand Mr. Pierce's testimony it is necessary to read the questions and answers leading up to the testimony which the respondents quote as well as the questions and answers following the testimony which they quote [Pierce Dep. 157-164, emphasis supplied; the portions of this testimony quoted in Respondent's Brief are in bold face]:

> "Q. Now, when you were installing International mufflers in that period of '56, prior to the time that you entered the Midas program, were you also purchasing from International either springs or shocks [shock absorbers]?
>
> A. Shocks.
>
> Q. Shocks?
>
> A. Only.
>
> Q. Only. *Now, did you cease purchasing shocks from International after you got into the Midas program?*
>
> A. *Yes.*

Q. Was it shortly after or when?
A. I would say shortly after.

Q. *And what was the reason for that action?*
A. *We were definitely advised that they were not in favor of us selling shocks or springs.*

Q. Did anyone from International or Midas advise you that International would no longer furnish you with shock absorbers?
A. No, I don't think so.

Q. Did you ever order any shock absorbers from International and have your order refused, after you were in the Midas program?
A. No, sir.

Q. So that this was a matter of your own decision in choosing to purchase shocks from other than International, is that correct?
A. No, sir.

Q. Why isn't it?
A. Because *I was advised by the field counselor that they did not approve the sale of shock absorbers in Midas shops.*

Q. But no one from International ever refused to sell you shock absorbers, did they?
A. I just discontinued ordering them from International.

Q. I assume that conversation was with Mr. Lichterman?
A. Yes, sir.

Q. *With whom else at Midas or International other than Mr. Nathan Sherman have you discussed the sale of shock absorbers by you as a Midas dealer?*
A. *Other field counselors.*

Q. Which one?
A. *All of them.*

Q. When was the first such conversation following Mr. Lichterman?
A. *If I remember right, the next field counselor was Jack Gordon. When he visited my shop the sale of shocks and springs were discussed.*

Q. Was this in Syracuse?
A. In Syracuse.

Q. Erie Street or –
A. Erie Boulevard.

Q. Erie Boulevard?
A. *As per orders from Mr. Gordon Sherman.*

Q. This is what he told you?
A. That's what Jack Gordon told me.

Q. What did he just say in substance?
A. *He said he had an assignment and the assignment was that he was to talk to me about discontinuing the sale of shocks and springs.*

Q. And what did you tell him?
A. I told him I thought it was ridiculous because shocks and springs were a very important part of our business, our established business, and that also, I felt it was unreasonable because we had been selling shocks and springs at the time they offered us the Midas franchise.

Q. And then, what did he say?
A. And it wasn't made a condition of the franchise, as far as discontinuing the shocks and springs.

Q. And what did he say, if anything?
A. *Well, he said his assignment was to tell me to discontinue the sale of shocks and springs,* and if I wouldn't, there was not much he could do about it; all he could do was make his report.

Q. Did you have any further conversations with him on this subject?
A. At different times.

Q. What did or would he say then?
A. *Practically the same conversation. He would advise me that it was his assignment, and he had to carry it through.*

Q. Who was the next field counselor you discussed this problem with?
A. Bill Zuckerman. I am not sure now if he came next to Jack Gordon.

Q. Will you give us the substance of your conversations on this subject with Mr. Zuckerman?

A. *Mr. Zuckerman told me that Gordon Sherman would like to have me discontinue the sale of shocks and springs,* and this same conversation, practically the same conversation came up on subsequent visits.

Q. And did you ever discuss it with Mr. Liss?

A. Yes, sir.

Q. And will you describe the substance of those conversations?

A. Practically the same conversation and the same answer.

Q. And Mr. Vosk?

A. I am not positive about Mr. Vosk.

Q. *Did any one of these field counselors ever threaten to withdraw your franchise if you didn't drop shocks or springs?*

A. *I was never threatened but they discussed the possibility.*

Q. Which one; which field counselor?

A. All of them.

Q. How would they discuss it?

A. *Well, they pointed out to me that the contract could be cancelled.*

Q. *Did they call your attention to any paragraph in the contract?*

A. *In other words, they didn't hand me a contract and show me the paragraph.*

Q. They did not?

A. No, but I knew it was in the contract and they knew it, but I did not feel it applied to me inasmuch as I handled these products to begin with. They were a part of my business and a very important part. In fact, I suggested to Mr. Nate Sherman he should add these items to his line, that I felt that would bring in more customers.

Q. This was in this conference at Chicago?

A. At one of them.

Q. Now, did you ever discuss this problem with Gordon Sherman?

A. Yes.

Q. When was the first such conversation?

A. On Mr. Gordon Sherman's visit to Syracuse and my other shops.

Q. Well, will you describe that conversation, please?

A. We were driving to Utica – Gordon Sherman, Mark Vosk and myself, to visit the Midas Shop in Utica, and the pressure had been so great previous to this regarding shocks and springs that it was getting to the point where, well, I guess we were both unhappy about it, and while we were driving to Utica, I said, **'Gordon, now how about this shock and spring business? I am sitting right on top of a fence, and if this continues I will have to go one way or the other.'**

He said, 'Joe, I will never tell you not to sell shocks and springs.' And I guess that was just about it, as well as I remember the conversation.

Q. Were any discussions – go ahead.

A. *Previous to this, the same day, we visited my warehouse on State Street and Gordon Sherman noticed some tailpipes from the Texas Tailpipe Company. He said, 'What is this Joe?' I said, 'Well, tailpipes from the Texas Tailpipe Company.'*

Gordon Sherman said, 'Joe, you know this is just like a marriage. It is like cheating on your marriage. It is grounds for divorce.' And he dropped it. That's about all. . . ."

Other testimony of Pierce sheds further light on methods used by respondents to enforce the restrictive provisions in their franchise agreements [Pierce Dep. 94-95]:

"Q. You indicated you had a conversation with Mr. Nate Sherman about carrying shocks and springs?

A. Yes I did.

Q. Do you remember when that was?

A. That would be the first visit or the second.

Q. The first visit to Chicago, is that right?

A. Yes. But I am almost sure it was the first visit.

Q. Would you describe the subject you discussed?

A. It was discussed in his office.

Q. Describe the substance of that conversation.

A. Well, it was a very friendly visit, and he mentioned to me that they objected to my handling of springs and shocks, also a short period I was installing brakes, and I agreed not to install brakes, and also agreed not to sell shocks and springs in my Elmira and Rome shops inasmuch as they were opened at a time after my original franchise.

What I am trying to say is this, originally prior to April 1, 1956, when the first three franchises were signed, we handled shocks and springs. So, when the question of shocks and springs was brought up, I agreed to discontinue them in the shops I opened after this period. In other words, I did not have them originally in these shops. But I did not agree to go along on the shops I had established before the Midas franchise."

Respondents' carefully selected references from the deposition testimony of Petitioner Pierce also ignore the following testimony which is printed in the record [A 128-129]:

"Q. Did you discuss this with Mr. Lichterman at the time you signed the first franchise?

A. I did.

Q. What did he say?

A. I told him that this paragraph that restricted me from selling nothing but exhaust muffler parts was just impossible for me to abide with, because I had shocks and springs for sale in my place of business, and I liked it. It was very a profitable part of my business, and I did not intend to discontinue the sale of them, and he said I wouldn't have to."

Respondents' suggestions that they did not enforce the restrictive provisions in their franchise agreements for the period 1955 to 1960 defies the written record made by

respondents' own hand. Respondents for example, terminated one of their franchisees for violating his franchise by selling brakes [A 177].[10] Respondent Sherman advised field counselors that it was "essential to participation in the Midas program that [their] dealers do not buy [tailpipes]" from the Texas Tailpipe Company [A 189]. Respondents even initiated a surveillance program to determine which of their dealers were purchasing their tailpipes from MIDAS [A 195-196]. Petitioner Pierce was one of the franchisees "isolate[d]" by this program [A 195]. Respondents' field counselors heeded Sherman's advice: One of them warned Petitioner Ross on several occasions. He wrote Ross and called his attention to the fact that Ross's automotive "glass business" was "against Midas policy" and that it was one of the points which was in the "limelight" [A 191]. The field counsellor, Gurnick, also wrote all of the dealers within his sphere of influence warning them that it was "Midas policy" to "buy" their "clamps", "Hollywood Mufflers" and "tailpipes" from MIDAS [A 193]. Later this same field counselor wrote petitioner Ross that he had been advised by Gordon Sherman that Ross was not "purchasing popular clamps from Midas." He said the clamps were "priced right, and even more important it was part of the policy to make such purchases from Midas." [A 194].[11]

It is obvious that, contrary to the allegations of respondents, petitioners "did not operate under the [so called] current unrestricted Midas franchise agreement form which has been in effect since 1960" during the period 1955 to 1960 [RB 60]. Petitioners operated under the franchise agreements in effect during 1955-1959. The terms of those agreements were enforced in letter and spirit. Each such agreement contained price fixing, exclusive dealing and tie-in provisions.

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[10] At a field counsellor meeting in the Fall of 1959 two of the principal topics on the agenda were: "How much can we take from Joe Pierce? A report on shocks and springs in Buffalo" [A 200]. Several months later Sherman described Pierce's "separation from the program" as the result of a "nervous list of offenses" [A 201].

[11] See also A 141-143.

B. Respondents Cannot Revive Their Trademark Defense.

Respondents seek to justify the merits of their program through the use of a trademark defense [RB 58, 60-62]. This defense is not available to respondents.[12] Moreover, it is wholly improper for respondents to assert it here. A comparison of respondents' argument at 60-62 in their brief with pages 21 through 27 of their Motion for Summary Judgment [R 1171-1178] reveals that the arguments now made are almost identical to the arguments which respondents made in the District Court. Respondents' arguments in the District Court were stricken on motion [R 1343-1354] of petitioners [A 113-114]. The history of that motion, decision and order are set forth in a memorandum which the petitioners filed with the United States Court of Appeals in No. 15862 on January 18, 1967. The District Court's decision was predicated on the fact that respondents refused to allow discovery with regard to their trademarks asserting in an objection to petitioners' interrogatory that the "complaint raises no issue respecting these trademarks, and the information sought is entirley irrelevant" [R 280]. Respondents did not appeal the decision of the District Court and it is wholly improper for them to raise the merits of their trademark defense in this Court when they have denied petitioners discovery relating to the very trademarks which they now attempt to use to justify the unlawful restrictions in their franchise agreements.

C. Respondents Enforced an Unlawful Tying Provision.

Respondents object to petitioners' assertion that their franchise agreement encompassed a tie-in which was unlawful [RB 62]. They assert that there was nothing unlawful about requiring franchisees to purchase tailpipes, exhaust

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[12] *Anchor Serum Co. v. F.T.C.*, 217 F.2d 867, 870-871 (C.A. 7, 1954); *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593, 598-599, 71 S. Ct. 971, 974-975 (1951).

pipes, and clamps [RB 63]. According to respondents the record does not even show that petitioners are claiming direct damages for such required purchases [RB 63]. Apart from that they suggest that their obtaining of registrations for the MIDAS trade and service marks which "covered" tail-pipes and exhaust pipes as well as the muffler [RB 63] some-how insulated the practice from antitrust liability. Moreover, Respondents also assert that the arrangement was not unlawful *per se* because Respondents did not have "sufficient economic power with respect to the tying product [the MIDAS muffler] to appreciably restrain competition in the market for the tied product[s]" [RB 63]. In any event respondents assert a tying device can be employed by a small company such as MIDAS "'in an attempt to break into the market'" [RB 63].

None of these arguments can stand.

(1) *Petitioners Claim Direct Damages from the Forced Purchase of Tailpipes, Exhaust Pipes and Clamps.*

Respondents' assertion that "the indisputable record fact [is] that [petitioners] are claiming direct damages from the purchase of the MIDAS Muffler alone" [RB 63] is not true. To support this statement Respondents refer to answers to interrogatories filed by petitioners Ross, Skarupa, Wheeler and Pierce. However, even a cursory reading of the very interrogatory answers which respondents cite refutes their contention. The full text of Ross's interrogatory answer, which is nearly typical, proves the point [R 899]:

> "[Petitioners] were required to purchase exhaust system parts exclusively from the [respondents] and as a result paid more for such parts by approximately 19% in the case of tail pipes, exhaust pipes, glas pack mufflers, clamps, hinges, etc., and 12% in the case of mufflers, than they would have paid had they been permitted to purchase them from alternative sources of supply. Total purchases of such parts from the [respondents] were $453,698.00 (121,-793.00 for tailpipes, exhaust pipes, glas pack mufflers,

> clamps, hinges, etc.; $331,905.00 for mufflers). Damages: $62,962.00."

Obviously, petitioners *are* claiming "direct damages" from tailpipe, exhaust pipe and clamp purchases which they were forced to make from MIDAS.

(2) *Respondents Did Not Use Their Trademarks on Tailpipes, Exhaust Pipes and Clamps.*

The record shows that respondents did not apply the trademark MIDAS to their tailpipes, exhaust pipes, clamps or hollywood mufflers. The Court of Appeals conceded an issue of fact on this point [A 221-222]. Defendant Schroeder testified as follows [A 166]:

> "Q. Was the Midas name placed on any of these items by putting the item in a box with a Midas name on it or by attaching a tag with a piece of wire or string during any of the period 1955 through and including 1960?
>
> A. Not to my knwoledge."

Petitioner Ross said [A 221]:

> "We could see no purpose, really, in buying pipes of that kind from Midas. There was no quantity discount. There was no freight allowance except the freight allowance when we shipped in larger quantity. Then we got a lower rate.
>
> "There was no insignia on the pipe. Certainly we wouldn't be confusing anybody by selling a pipe from Texas rather than a pipe sold to us by Midas."

Petitioner Skarupa's testimony was to the same effect [A 222]:

> "A. I don't think we can ascribe the word 'Midas' to the tailpipes because they weren't identified as such and people didn't come in asking for Midas tailpipes. There was no guarantee on the tailpipes.
>
> Q. They were not identified as 'Midas' on the boxes were they not?
>
> A. No, sir.

Q. They were not?
A. Sir?
Q. They were not?
A. Midas tailpipes were not identified as Midas tailpipes, as you are stating it.
Q. On the boxes in which they were shipped?
Q. The tailpipes didn't come in boxes; they came in bundles.
Q. There was no identification of 'Midas' or anything on anything on the bundles?
A. The packing slip which was tied with wire, but that wasn't affixed to the tailpipes."

While respondents obtained registration of the mark "MIDAS" to cover tail pipes, exhaust pipes and clamps they did not apply the mark to these items. Their mere registration could not insulate respondents' tying practices from the antitrust laws. Indeed, it would be petitioner's contention that registration *and* use could not insulate such practices; but here we need not concern ourselves with such a hypothetical situation because there was no use of the trademarks on these items.

(3) *Respondents Had Sufficient Economic Power with Respect to the Midas Muffler To Appreciably Restrain Competition in the Market for Tailpipes, Exhaust Pipes, and Clamps; Respondents Were Not a Small Company Breaking into a Market.*

Respondents suggest that they did not have sufficient economic power with respect to their MIDAS muffler to restrain competition in the sale of tailpipes, exhaust pipes and clamps. They offer nothing to support this contention which ignores the fact that respondents sold their MIDAS muffler under the auspices of a national advertising program whose cost exceeded $3,000,000 and featured the trademark as well as a "unique" coast to coast lifetime guarantee. These facts satisfy the test stated in *White Motor Co. v. United States,* 372 U.S. 253, 262-263, 83 S.Ct. 696 (1963) and cases cited therein. Sufficient economic power may be in-

ferred from the desirability of the tying product to consumers or from uniqueness in its attributes. *United States v. Loews, Inc.*, 371 U.S. 38, 45, 83 S.Ct. 97, 102 (1962). Indeed the required control of the tying product "may be inferred from the seller's success in imposing a tying condition" upon a substantial amount of commerce in the tied product "at least in the absence of some other explanation for the existence of the restraints." *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (C.A. 9, 1964), cert. denied 377 U.S. 993, 84 S.Ct. 1920 (1964).

Respondents can hardly be considered a "small company" attempting to break into a market. The parent company was organized in 1938 [A 65]. For over a quarter of a century prior to 1955 it engaged in the wholesale distribution of automotive replacement parts, "primarily exhaust parts, i.e., mufflers, tailpipes and exhaust pipes" [A 65]. In the ensuing three years, with the aid of tying agreement provisions in their MIDAS franchise agreement, respondents increased their wholesale volume more than three fold to more than $17,000,000 annually [RB 13]. They cannot be considered "a small company" breaking into a market. Their volume was substantial in 1955 when they initiated the MIDAS concept; and their business history of over a quarter of a century hardly suggests that they were breaking into a market in 1955. They were already in the market in a substantial way.

Respondents' present attempt to segregate MIDAS sales from International Sales is rather anomalous in view of their repeated assertions heretofore that MIDAS and International are one and the same company. It is often difficult for petitioners to determine which "shell the pea is under". During the course of discovery respondents were particularly careful to make it plain that MIDAS, INC. made *no* sales from the time it was organized until the date of the complaint [Sherman Dep. 147-148]. Indeed, in their response to petitioners' subpoena duces tecum of November

22, 1966 they *made it absolutely plain that MIDAS made no sales.*[13]

Respondents' protests against petitioners' "attribution" of $17,000,000 in sales, and 350 MIDAS muffler shops in 42 states, as well as their comparison of their MIDAS brand sales of $8,000,000 to petitioners' sales of $1,774,000 is, to quote respondents, "seriously misleading". Respondents admit to only 258 MIDAS muffler shops at the time petitioners' franchises were terminated [RB 63]. According to the December 1959 issue of respondents' "Dealer Dabbler" [Krieger Dep., Plaintiffs' Exhibit 29 for identification], however, respondents ended the year 1959 with almost 325 muffler shops in operation. Moreover, by August 16, 1961 according to an S.E.C. prospectus of International Parts Corporation, the number of such shops had increased to 355, not counting 18 shops which company subsidiaries operated themselves. The May-June 1960 issue of the "Dealer Dabbler" [Krieger Dep., Plaintiffs' Exhibit No. 35 for identification] represents that respondents' franchisees operated muffler shops in 43 states.

It is difficult to understand the MIDAS sales figures used by respondents in their brief in light of the record (RB 13]. Jacob, on whose testimony respondents rely, testified that he had no idea of the total value of sales of the so-called MIDAS division of International Parts, Inc. [Jacob Dep. 167]. He represented his estimates of $4,000,000, $6,000,000, and $8,000,000 in MIDAS brand sales as nothing more than guesses [Jacob Dep. 170]. Recognizing that MIDAS *brand*

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Product	*Product Sold By* International	Midas	Powell	MCA	Approximate Years in Which Sold
(1) Mufflers	X		X	X	1955-1960
(2) Exhaust Pipes	X		X	X	1955-1960
(3) Tail Pipes	X		X	X	1955-1960
(4) Shock Absorbers	X				1955-1960

* * *

sales do not reflect all of MIDAS franchise purchases of tail-pipes, exhaust pipes and clamps (none of which were trade-marked), the figures which respondents represent in their brief [RB 12-13, 63] are meaningless in the context in which respondents use them. This becomes even more evident when one realizes that these same sales represent sales at whole-sale whereas the figures attributed by respondents to petitioners represent sales at retail. Literally the figures have no relationship to one another. One fact, however, does emerge and that is that the respondents have not contested petitioners' assertion that respondents, with 11% of the market, were the fifth largest distributor of automotive exhaust parts for the replacement market in the United States in the year 1960 [PB 14-15]. Petitioners submit that respondents had sufficient economic power, with respect to their $8,000,000 MIDAS Muffler sales, to appreciably restrain competition in the sale of non-trademarked tailpipes, exhaust pipes and clamps, and that an appreciable amount of commerce in tailpipes, exhaust pipes, and clamps was in fact restrained ($17,000,000 total sales, including muffler sales).

D. Respondents "Reneged on Their Original Promise" With Respect to Their Guarantee.

Respondents object to petitioners' characterization [RB 64-65] of their 1959 change in their guarantee program as either "unilateral" or as "reneg[ing] on their original promise." In any event they assert that this change did not constitute a violation of either Section 1 of the Sherman Act or Section 3 of the Clayton Act. [RB 65].

Respondents have misstated the record as well as petitioners' complaint. Petitioners have never contended that respondents' guarantee program or any changes made in that program constituted a violation of either Section 1 of the Sherman Act or Section 3 of the Clayton Act. They have contended that respondents' change in their guarantee program constituted an antitrust violation of Section 2 of the Robinson Patman amendments to the Clayton Act, 15

U.S.C. 13. The Court of Appeals sustained this contention by remanding petitioners' Robinson-Patman Claim to the District Court for Trial. [A 216-223].

Whether respondents' decision to reduce their share of the guarantee replacement expense from 100% to 50% represented a "unilateral" change in their guarantee and constituted a "reneg[ing] on their original promise" is a question of fact. In light of the record, however, the fact is hardly susceptible to interpretation. Respondents cannot rely (though they did in their brief) upon the testimony of Pierce to support their contention that the National Advisory Council "adopted" a decision to share the guarantee expense on a "50-50 basis" [RB 64]. The National Advisory Council did not "adopt" such a decision and the testimony on which the respondents erroneously rely clearly shows this [Pierce Dep. 171-173]:

> "Q. Now, coming back to this October, 1958 meeting at which the guarantee was discussed—
>
> A. Yes, sir.
>
> Q. Did you participate in the discussion of the guarantee?
>
> A. No, sir—in the discussion?
>
> Q. Yes, sir.
>
> A. Of the guarantee?
>
> Q. Yes.
>
> A. I don't think we had any opportunity to discuss the guarantee. We were told that the guarantee was changed to a fifty-fifty basis.
>
> Q. Isn't it a fact that at that meeting Mr. Gordon Sherman announced the policy and then asked the National Advisory Council to discuss it among themselves?
>
> A. Yes.
>
> Q. Didn't you do that?
>
> A. We did, but—
>
> Q. What was the substance of that discussion?
>
> A. Well, naturally, the dealers were dissatisfied with the new policy on guarantee, and I discussed

> with the Advisory Council, I said, 'if you fellows feel that way about it, why don't we say something about it, sit down and say something about it.' When we sat down we didn't have an opportunity to say anything about it. It was just passed over like that. In other words, that was the new policy, and Mr. Gordon Sherman made up his mind it was a fifty-fifty basis, and obviously, it was useless to discuss it."

Whether or not respondents' franchise required respondents to defray 100% of the guarantee replacement expense is also a question of fact, and it too is hardly susceptible to interpretation. The franchise agreement provided:

> "Seller agrees, during the continuance of this agreement, to replace and/or adjust to the Buyer any merchandise purchased from the Seller by the Buyer within the limits of such specific guarantees as Seller furnishes" [A 42-43].

Under the quoted language respondents were required to make their guarantee "good" whatever it was. In any event respondents' arguments about their guarantee do not by any manner or means justify the unlawful restrictions in their franchise agreement.

III

THE RECORD ESTABLISHES THE FACT OF A CONSPIRACY IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT AS WELL AS AN AGREEMENT IN RESTRAINT OF TRADE IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT.

(This section discusses material in Respondents' Brief, pp. 68-72)

Respondents argue that petitioners have "abandoned" their contention that respondents conspired in violation of Section 1 of the Sherman Act [RB 70]. They complain that petitioners are now attempting to "revive" this contention. This assertion is at odds with the record.

Petitioners never abandoned their conspiracy contentions. In their brief in the Court of Appeals they contended that the conspiracy among respondents here came within the doctrine announced by the Fifth Circuit in *Nelson Radio and Supply Co. v. Motorola*, 200 F.2d 911, 914 (C.A. 5, 1952) where the Court said:

> ". . . and of course a corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade, but that involves separate corporate entities . . ."

Respondents' "abandonment" argument ignores petitioners' brief in the Court of Appeals [Petitioners' Brief, Appeal No. 15872, C.A. 7, 1967 at 34-35]. Their argument that no conspiracy existed also ignores the record. MIDAS, Inc. and International Parts, Inc. held themselves out as "competitors" and as "separate and divorced" despite respondents' protests to the contrary. Indeed Circuit Judge Cummings in his dissent had little trouble finding a conspiracy [A 226]:

> "With respect to the majority's alternate basis discussed at [A 215] supra, this record shows that Midas and International held themselves out as separate and 'divorced'. Therefore *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, does not permit [respondents] to claim that as a single business entity they were unable to conspire. Furthermore, under *Simpson v. Union Oil Co.*, 377 U.S. 13, and *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, a conspiracy is not needed to support Count I [the section 1 Sherman Act Claim]."

Circuit Judge Cummings' findings are fully supported by the record. Gordon Sherman acknowledged advising MIDAS franchisees[14] that International was "divorced" from MIDAS [Sherman Dep. 65]:

> "There are only three points which need particular emphasis, I think. Divorcing International Parts from Midas was covered. I am speaking of my

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[14] Franchisees thought that MIDAS, Inc. and International Parts were separate and distinct companies [Ross Dep. 98].

> father now. This afternoon at the Owners Luncheon, I think it was treated to everyone's satisfaction. They are completely divorced except that one helps to carry the other."

That International and MIDAS were competitors is borne out by the testimony of petitioner Ross. He stated that he frequently made complaints to Gordon Sherman about sales of International Brand Mufflers by Tideys, one of his competitors. Tideys retailed and installed an International Brand muffler with a guarantee which was the "same" as the MIDAS guaran-tee in competition with petitioner Ross [A 137]. Ross complained because he was unable to compete with Tideys since he had to maintain the resale price fixed by MIDAS, whereas Tideys was free to sell the International Brand muffler below the price which Ross was required to maintain [A 137]. Tideys in fact advertised the International Brand muffler as being the same as respondents' MIDAS muffler with the same guarantee [Ross Dep. 211]. Sherman's only response to Ross's complaint was to express "wonderment that [Ross] should feel restricted by the MIDAS maintain-the-price merchandising. . . ." [A 197].

Further evidence that the respondents International and MIDAS conspired with one another is the fact that International refused to sell its International Brand muffler to MIDAS franchisees while MIDAS, Inc. refused to sell its MIDAS brand to customers of International. The Court below alluded to this in its opinion in remanding petitioners Robinson-Patman Claim. The Court of Appeals said [A 219]:

> "We think the finding, 'the evidence is uncontroverted in demonstrating that [petitioners] were free to purchase either product [International or Midas] but chose Midas is erroneous. [Petitioners'] freedom in this respect was forfeited by the terms of the franchise agreements. The record contains much evidence that there was a continuing effort on the part of Midas to enforce the exclusive dealer requirement.

> "A few excerpts from the record are sufficient to demonstrate at least that there was an issue as to whether [petitioners] were free to handle any product other than purchased from Midas. . . ."

Pierce's testimony to which respondents refer in their statement of the case [RB 17-18] does not refute the foregoing statement of the Court of Appeals. Respondents suggest that Pierce testified that he was not cut off from the International brand by International Parts after he became a MIDAS dealer. He did say that he continued to buy International brand parts for his retail stores throughout his association with MIDAS. [RB 17-18]. While this is true, the respondents fail to mention the fact that the record shows that Petitioner Pierce continued to sell International Brand products at his "retail" locations which were not franchised by the respondent MIDAS as distinguished from his locations which were franchised by respondent MIDAS. Respondents did not sell Pierce the International brand for his MIDAS installation shops. Under the circumstances, the fact that International continued to sell its International Brand mufflers to Pierce means nothing [Pierce Dep. 28, 47]. The plain fact is that International would not sell its International brand muffler to MIDAS dealers and MIDAS, Inc. would not sell its MIDAS brand muffler to International dealers. Neither company would compete with the other for sales despite the fact that their customers competed with one another. Compare *Hawaiian Oke Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D.C. Hawaii, 1967).

The lower court's dismissal of Count I, Petitioners' Section 1, Sherman Act claim, was erroneous in any event since conspiracy is not essential to state a claim under Section 1 of the Sherman Act. The record disclosed hundreds of franchise agreements in restraint of trade. These agreements are proscribed by Section 1 of the Sherman Act as well as Section 3 of the Clayton Act. Respondents' argument that petitioners did not plead an agreement in restraint of trade within the meaning of Section 1 is nothing more than a

compartmentalization of the various factual components of the complaint and "wiping the slate clean after scrutiny of each." Petitioners' complaint should not be judged "by dismembering it and viewing it in separate parts, but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410 (1962).

IV

SUMMARY JUDGMENT IS INAPPROPRIATE UNDER THE CIRCUMSTANCES OF THE CASE AT BAR SINCE THERE WERE DISPUTED ISSUES OF MATERIAL FACT.

[This section discusses material in Respondents' Brief pp. 73-75]

The record raises substantial issues of fact which should have been decided on trial by a jury and not by a Judge on a Motion for Summary Judgment. The Court below ignored petitioners' demand for jury trial and decided factual issues without reference to what a jury might have done with the record before it. The District Court had no right to decide this case on a Motion for Summary Judgment in view of the substantial factual questions which existed. Examples of some of these are:

(a) Whether all petitioners "voluntarily entered into" the agreements which are the subject of this litigation.

(b) Whether respondents coerced, intimidated or used other means of illegal persuasion to compel petitioners to observe the unlawful provisions in respondents' franchise agreements.

(c) Whether respondents tied the sale of unbranded automotive exhaust system parts such as tailpipes, exhaust pipes, clamps, hangers and hollywood mufflers to the sale of their MIDAS muffler.

(d) Whether there was a conspiracy among respondents to fix prices or in any other manner restrain trade.

(e) Whether respondents terminated petitioner Pierce's dealer agreements because he refused to adhere to the unlawful provisions of the respondents' franchise agreement.

By granting summary judgment the Court below removed these and other factual decisions from the province of the jury which the petitioners demanded.

CONCLUSION

For all the foregoing reasons, petitioners respectfully urge that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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